

provide their information service offerings."<sup>39</sup> Regrettably, the answer to both of these questions is an emphatic "no."

ONA is a failure. It has never been, is not now, and is unlikely ever to become an effective means of either eliminating BOC discrimination or promoting innovative use of the local network. Consequently, consistent with Congress' direction that the Commission eliminate unnecessary regulatory requirements, we believe that the Commission should terminate this regulatory exercise. The Commission also should replace the existing ONA reporting requirements with narrowly tailored reporting requirements that will provide useful information regarding BOC provisioning while avoiding unnecessary regulatory burdens.

**A. ONA has Failed; It Should be Abolished**

The Commission adopted Open Network Architecture ("ONA") in Computer III. As originally conceived, ONA was to require the BOCs to fundamentally unbundle their network into essential building blocks, which were to be made available, pursuant to tariff, to competing Information Service Providers.<sup>40</sup> The Commission claimed that ONA would create a "self-enforcing" mechanism to prevent the BOCs from discriminating against non-affiliated ISPs,<sup>41</sup> while allowing independent ISPs to make new and innovative uses of the existing monopoly networks.<sup>42</sup>

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<sup>39</sup> Id. at ¶ 87.

<sup>40</sup> Computer III Order, 104 F.C.C.2d at 1064.

<sup>41</sup> Id. at 1063.

<sup>42</sup> Id. at 1064.

No serious observer can claim that ONA has come anywhere close to achieving the goals that the Commission initially established. There are two reasons for this: The Commission failed to require the BOCs to fundamentally unbundle their network. And the Commission insisted that any ISP that wants to purchase ONA Basic Service Elements ("BSEs") pay carrier access charges.

**No fundamental unbundling.** In Computer III, the Commission directed the BOCs to unbundle their monopoly local transmission networks into its essential building blocks, and make these elements available to their competitors. From the outset, the BOCs fiercely resisted compliance, arguing that such a "radical reconfiguration" of their networks was not technically feasible. Instead, the carriers submitted ONA plans that merely repackaged existing network switching features, and bundled these with existing interstate access arrangements.<sup>43</sup>

The Commission recognized that the BOCs' ONA Plans fell far short of the agency's requirements. Nonetheless, in the BOC ONA Order, the agency announced that it would accept the plans, and would not require "fundamental unbundling" of the BOCs' network "at this time."<sup>44</sup> Rather, the Commission declared that ONA was to be an "evolutionary process."<sup>45</sup> In no subsequent order, however, did the Commission ever require the BOCs to provide the "modular" or "disaggregated" network architecture that ONA was supposed to

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<sup>43</sup> See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 41-42, 168-69, 176, 196-202 (1988) (subsequent history omitted).

<sup>44</sup> Id. at 42.

<sup>45</sup> Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3103, 3105 (1990).

deliver. The end-result, in the words of the Ninth Circuit, is that the Commission "retreated" from its original goals and contented itself with a "diluted" version of ONA.<sup>46</sup>

**Imposition of carrier access charges.** The Commission's failure to require fundamental unbundling of the BOCs' networks is only half the problem. In the ONA Order, the Commission held that ISPs that want to obtain interstate ONA services are required to pay above-cost carrier access charges.<sup>47</sup> Evidence provided to the Commission in the Part 69 ONA proceeding indicated that imposing carrier access charges could increase ISPs' access costs by as much as 700 percent.<sup>48</sup> As a result, most ISPs were "priced out of the market" for ONA services.

Due to these fundamental flaws, ONA has become a meaningless exercise in which the BOCs file huge volumes of documents that no one reads, offering to provide services that no one wants, at a price that no one will pay. Indeed, ITAA is not aware of any

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<sup>46</sup> California III, 39 F.3d at 928 & 929.

<sup>47</sup> See Filing and Review of Open Network Architecture Plans, Order on Reconsideration, 5 FCC Rcd 3084, 3085 (1990). The Commission rejected a suggestion that ESPs be allowed to "mix-and-match" state-tariffed access arrangements with federally tariffed ONA features, known as Basic Service Elements ("BSEs"). See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 4524, 4535 (1991). The Commission also declined to order the BOCs to offer a flat-rate federally tariffed access arrangement, known as a Basic Serving Arrangements ("BSAs").

<sup>48</sup> See, e.g., Comments of Tymnet-McDonnell Douglas Network Systems Company at 19-21 (Aug. 10, 1989); Comments of ADAPSO at 38-40 (Aug. 10, 1989); see also Report of Hatfield Associates at 12-13.

independent ISP that currently uses ONA services.<sup>49</sup> Rather, consistent with Commission regulations, ISPs typically purchase standard business line service out of applicable State end-user tariffs.

No amount of regulatory tinkering can salvage ONA. The only sensible action that the Commission can take is to abolish this program and start from scratch.

**B. The Commission Should Eliminate Useless Reporting Requirements**

The Open Network Architecture program requires the BOCs to generate vast amounts of paperwork. This includes annual ONA reports, semi-annual ONA reports, and ONA nondiscrimination reports. In the Notice, the Commission rightly asks whether these voluminous filings are either necessary or helpful.<sup>50</sup> The short answer is that they are not. One of the most significant benefits that would result from the termination of ONA would be the elimination of these reporting requirements.

This is not to say that the Commission should eliminate all BOC non-discrimination reporting requirements. As demonstrated above, because they continue to control the underlying transmission facilities necessary to deliver information services to subscribers, the BOCs have the ability to discriminate against rival ISPs. Requiring the BOCs to provide information that compares the quality, availability, and reliability of the telecommunications

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<sup>49</sup> Indeed, the principal customers for virtually all ONA offerings are the BOCs themselves (and IXC's forced to replicate Feature Group Service through the purchase of BSEs and BSAs).

<sup>50</sup> Notice ¶ 101.

services that they provide to affiliated and non-affiliated ISPs can help -- in a limited but yet significant manner -- to deter to anti-competitive conduct.

ITAA urges the Commission to convene a working group, consisting of both carrier and ISP representatives, that can recommend an effective set of reporting requirements. These requirements should ensure that the BOCs provide useful information regarding their provisioning practices, while not imposing unnecessary burdens on the carriers.

**IV. THE COMMISSION SHOULD REVISE ITS RULES TO FACILITATE COMPETITIVE PROVISION OF DATA TRANSPORT SERVICE BETWEEN END-USERS AND INFORMATION SERVICE PROVIDERS**

In the Notice, the Commission also seeks comment regarding the effect of Section 251 on the ability of ISPs to obtain access to the "building blocks" of the local network. In particular, the Commission asks whether granting the Section 251 rights granted to CLECs is adequate to meet the needs of ISPs, or whether the Commission should provide "section 251-like" rights directly to ISPs.<sup>51</sup>

ITAA welcomes the growth of the CLEC sector. We do not believe, however, that CLECs will be able to meet fully the needs of the information services industry in all markets. Nonetheless, ITAA does not believe that it is necessary or advisable for the Commission to give ISPs "carrier-like" Section 251 rights -- especially if the price of these rights is the imposition of "carrier-like" regulatory obligations. Rather, ITAA urges the Commission to modify its rules to allow CLECs, Competitive Access Providers ("CAPS"), and

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<sup>51</sup> See Notice ¶¶ 95-96.

ISPs themselves to provide local data transport services necessary to transport data between subscribers and their information service providers.

**A. The Deployment of New, Data-Oriented Local Transport Services Raises the Prospect of Increased Discrimination by the Incumbent Local Exchange Carriers**

In recent years, as a result of the significant growth of the Internet and other information services, the volume of data traffic carried over the local network has increased dramatically. Until now, the overwhelming majority of the traffic between subscribers and their information service providers has been carried over the incumbent LECs' circuit switched network. This traffic goes from the subscriber's premises, over the subscriber's "twisted copper" local loop, to the ILEC's serving central office. At that point, the traffic passes through the ILEC's circuit switch, which establishes a physical link to local telephone lines connecting the central office to the ISP's local hub. The ISP, in turn, routes it on to its high-capacity network, and sends the data on to a metropolitan aggregation point. From there, the user data may be routed to local servers, or it may be sent on to the ISP's proprietary information service network or to the Internet.

There is widespread agreement that, as data traffic continues to grow, the use of the ILECs' local circuit switched networks -- which were designed for voice traffic -- will become increasingly less efficient. As the Commission has recognized, its policies must foster the deployment of the "high-bandwidth data networks of the future."<sup>52</sup> These networks will

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Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; Usage of the Public Switched Network by Information Service and Internet Access Providers, 11 FCC Rcd 21354, 21490-21491 (1996).

differ from the current circuit-switched network in two fundamental respects. First, the subscriber loop will be upgraded to a broadband conduit capable of carrying large amounts of data at very high speeds between the subscriber's premises and the carrier's central office. This can be done by deploying Digital Subscriber Loop technology ("xDSL"), which has proven to be able to transform the existing twisted copper loops into broadband conduits. Second, at the central office, data will be "split off" from voice traffic, aggregated onto packets networks (based on frame relay, ATM, or other protocols), and transported over a high speed transport line (such as a T1, T3, or OC3) to the ISPs' premises. This can be done by deploying a device, known as a Digital Subscriber Line Access Multiplexer ("DSLAM"), in each serving central office.

The introduction of xDSL and high-speed packet technology holds great promise for ISPs and their customers.<sup>53</sup> But it also holds great potential for anti-competitive abuse by the BOCs and other incumbent LECs. In particular, an ILEC that provides xDSL, and deploys DSLAMs in each of its central offices, can route packetized data from each office to an ILEC data aggregation point. At that point, the data can be sent to the individual ISPs. This approach can facilitate two types of anti-competitive conduct. First, the ILEC can use its control over the xDSL-based loops to gain control of the local packetized data transport market (thereby rendering the ISPs' existing local data transport networks redundant). Second, the ILEC can design, deploy, and operate its data transport network in a manner that favors its affiliated ISP.

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<sup>53</sup> The term "packet" is used broadly to refer to cell, frame, and packet-based data transport technology.

**B. The Commission's Rules Should Promote Competitive Provision of Local Data Transport Services**

Experience demonstrates that the existence of an ONA-type regime -- which requires the incumbent monopoly carrier to provide services to competitors on a non-discriminatory basis -- is unlikely to be able to overcome the carriers' strong incentives to discriminate against non-affiliated ISPs.<sup>54</sup> ITAA therefore does not support proposals to grant ISPs Section 251-type rights, which would allow them to purchase unbundled network elements directly from the ILECs. Rather, ITAA believes that the only effective means to prevent such abuse is to facilitate competition in the local data transport market. ITAA therefore urges the Commission to ensure that its rules promote a wide range of options that enable ISPs to obtain data traffic from their customers. This includes:

- Preserving ISPs' right to purchase State-tariffed circuit switched business lines from the incumbent LECs on the same terms as other large business users.
- Ensuring that ILECs provide xDSL transport service to the ILEC's information services affiliate, and to non-affiliated ISPs, on a non-discriminatory basis.
- Facilitating entry by Competitive Local Exchange Carriers, which can provide end-to-end services between ISPs and their subscribers.
- Modifying the existing Expanded Interconnection rules to allow Data-oriented Competitive Access Providers (D-CAPs) to obtain aggregated data traffic, at cost-based prices, from the ILECs at the serving central office.
- Modifying the Expanded Interconnection rules to give ISPs the same rights as D-CAPs to obtain aggregate data traffic from ILECs for transport over the ISPs' packet networks.

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<sup>54</sup> See California III, 39 F.3d at 929 (noting that ONA did not prevent BellSouth's anti-competitive abuses in the voicemail market).



We discuss each of these options below.

**LEC-provided business line service.** The Commission has long recognized that ISPs, like other businesses, use the telephone network to receive communications from their customers. The Commission, therefore, has consistently held that ISPs may connect to the network using the same State-tariffed business lines as other end-users. While business line service may not be ideally suited for data traffic, many ISPs find it adequate for their needs. As the Commission has concluded, ISPs' use of these arrangements does not result in either undue network congestion or the imposition of uncompensated costs on the ILECs.<sup>55</sup> The agency, therefore, should reject any proposal to deprive ISPs of this option.

**LEC-provided xDSL service.** As noted above, a number of the incumbent LECs are seeking to limit the availability of xDSL-based transport to those customers that also purchase the ILEC's affiliated information service. The Commission should not allow the incumbent LECs to do so. Rather, the Commission should make clear that xDSL-based transport is a regulated telecommunications service, which must be provided to affiliated and non-affiliated ISPs on a non-discriminatory basis. Under this approach, an ISP -- whether carrier-affiliated or independent -- would be permitted to purchase this service, combine it with their information service offerings, and provide an integrated non-regulated information service to subscribers.

**Competitive Local Exchange Carriers.** The entry of CLECs into the local transport market has the potential to provide ISPs -- for the first time -- with a meaningful

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<sup>55</sup> Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, 12 FCC Rcd 15982, 16133-16134 (1997).

choice. ITAA urges the Commission to continue its efforts to ensure that these new entrants are able to obtain access to Unbundled Network Elements at cost-based prices. At the same time, however, ITAA does not believe that the entry of CLECs into the local transport market -- by itself -- can prevent the BOCs and other incumbent LECs from discriminating against non-affiliated ISPs.

In the typical situation, the subscriber selects the LEC. For many subscribers, the fact that the incumbent LEC may discriminate against non-affiliated ISPs will not deter the subscriber from taking its service. In some cases, the subscriber will not be aware of the discrimination. In other cases, the subscriber may place greater weight on factors other than their ability to get "equal access" to non-affiliated ISPs -- such as the incumbent's established reputation, the price of its service, and the perceived service quality. This is especially true if the subscriber plans to use a single line for both voice and data services. Consequently, the existence of CLECs is not an entirely effective "check" on the ability of an incumbent LEC to discriminate against non-affiliated ISPs.

A possible alternative is for the ISP to market an end-to-end service to its subscribers, which combines CLEC-provided xDSL transport between the subscriber's premises and the serving central office, packet transport from the central office to the ISP's premises, and the ISP's Internet or other service. If the end-user has been taking local service from the incumbent LEC, however, the ISP either would need to convince the customer to switch carriers or to install a second line (provided by the CLEC) for use in connection with the ISP's service. This approach might not be acceptable to many customers. Even if subscribers were willing to accept this arrangement, the CLEC would need to obtain the loops from the incumbent LEC.

As a result of the decision of the Eighth Circuit in Iowa Utilities Board, however, the CLEC may have to pay a price substantially in excess of long-run incremental cost -- significantly decreasing the commercial viability of the offering.

**D-CAPs.** In light of the above, it is necessary for the Commission to foster additional forms of competition in the market for local data transport services. ITAA believes that the Commission can accomplish this goal by modifying its Expanded Interconnection rules to allow for the development of data-oriented Competitive Access Providers or D-CAPs.

In the Expanded Interconnection Order, the Commission recognized that the obligation to provide "end-to-end" service can significantly deter competitive entry. The Commission therefore required the incumbent LECs to unbundle the basic elements of their networks -- loop, switching, and local transport -- so that a CAP could provide only the segment requested by its customers. Under this approach, many CAPs provide the high-capacity transport links between the incumbent LECs' serving central office and the points of presence of their customers' interexchange carrier.

ITAA urges the Commission to initiate a new proceeding to consider how to adapt the Expanded Interconnection regime to meet the needs of ISPs and their customers. ITAA believes that this would require only relatively minor changes in the Commission's existing regulations. Specifically, incumbent LECs would be required to hand-off to a D-CAP aggregated data traffic at the ILEC's central office.<sup>56</sup> The ILEC would be required to charge the D-CAP a cost-based rate that reflects its incremental cost to: (1) strip off voice traffic (if

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<sup>56</sup> Incumbent LECs are increasingly locating the main distribution frame at a remote terminal located between the subscriber's premises and the serving central office. Special arrangements may be required to deliver the data traffic in such instances.

required); (2) packetize and multiplex the data traffic onto the D-CAP's trunks so that the D-CAP can carry the traffic on its own high-capacity packet network; and (3) physically interconnect with the D-CAP. To deter discrimination, the incumbent LECs should be required to charge the same rate when it hands off this traffic to its information service affiliate.

This approach would allow D-CAPs to provide local packet transport service to ISPs without having to provide xDSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer the service. Moreover, by separating the provision of loop service from the provision of local transport, the Commission would reduce the ability of the incumbent LECs to use their control over the local loop to discriminate against non-affiliated ISPs.

**ISP self-provisioning.** ITAA believes that the combination of D-CAPs and CLECs will be able to meet the needs of ISPs and the subscribers in most markets. ITAA recognizes, however, that it may be a long time (if ever) before such competitive services are universally available. Consequently, ITAA believes that the Commission's rules should allow ISPs themselves to obtain aggregated data traffic from the incumbent LECs on the same terms as the D-CAPs.

**C. The Proposed Modifications are Within the Commission's Legal Authority**

The proposed regime is well within the Commission's legal authority. As the Commission has recognized, traffic between ISPs and their subscribers is jurisdictionally mixed, and cannot feasibly be separated into inter-state and intra-state components.<sup>57</sup> Consequently,

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<sup>57</sup> See Brief for the Federal Communications Commission, Southwestern Bell Tel. Co. v FCC, Docket No. 97-2618 (8th Cir.).

while the Commission has acted within its authority by allowing this traffic to be carried over State-tariffed business lines, the Commission could develop a parallel Federal regulatory regime applicable to this traffic. As the Commission's experience under both the Expanded Interconnection and Section 251 regimes demonstrates, such an approach is both pro-competitive and technically feasible.


### CONCLUSION

For the foregoing reasons, the Commission should: (1) confirm that the Telecommunications Act codified the existing dichotomy between regulated and non-regulated services; (2) require the BOCs to provide all information services through a separate affiliate that complies with the requirements of Section 272; (3) eliminate ONA and unnecessary ONA reporting requirements; and (4) modify its rules to promote competitive deployment of local data transport services by Incumbent Local Exchange Carriers, Competitive Local Exchange Carriers, Competitive Access Providers, and ISPs themselves.

Respectfully submitted.

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